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THE JURY AND ITS DEVELOPMENT.

II.

1. IN early times the inquisition had no fixed number. In the Frankish empire we are told of 66, 41, 20, 17, 13, 11, 8, 7, 53, 15, and a great variety of other numbers (Brunner Schw. 111–112). So also among the Normans it varied much, and "twelve has not even the place of the prevailing *grundzahl;*" the documents show all sorts of numbers — 4, 5, 6, 12, 13–18, 21, 27, 30, and so on (ib. 273–4). It seems to have been the recognitions under Henry II. that established twelve as the usual number (ib. 363); even then the number was not uniform. In the "inquest of office," it always continued to be uncertain. "This, [holding an inquisition] is done," says Blackstone,[1] "by a jury of no determinate number; being either twelve, or less or more." In 1199 (Rot. Cur. Reg. ii. 114) there is a jury of nine. In Bracton's Note Book, at dates between 1217 and 1219, we see juries of 9, 36, and 40, — partly owing, indeed, to the consent of litigants. We have already noticed that the grand assise was sixteen, made by adding the four electors to the elected twelve, and that recognitions as to whether one be of age were by eight. The attaint jury was usually twenty-four; but in the reign of Henry VI. a judge remarked that the number is discretionary with the court.[2]

[1] Com. iii. 258, cited by Brunner.

[2] For other cases in England and Normandy, see Brunner, Schw. 364, and Hargrave's note, Co. Lit. 155.

2. The rule of unanimity in giving a verdict was by no means universal at first. A doctrine had a considerable application in Normandy and survived in England, that it was enough if eleven agreed; the ground of this being the old rule that a single witness is nothing — *testis unus testis nullus.*[1] Then in certain cases a majority of the twelve was enough; as in the assise of novel disseisin, in which only seven were necessarily present, these seven being then required to be unanimous. Brunner's remark is very likely true, that "Only in the second half of the fourteenth century did the principle get established that in all inquests the twelve must agree in order to a good verdict."[2] The Mirror appears to assert an opinion which I have not observed elsewhere, that "since two witnesses are enough, according to the Word of God" (*solonque le dit de Dieu*), a verdict should be held good if even two only are found to agree.[3] But we are probably to understand this courageous writer to be asserting his own opinion of what ought to be held for law. Thus regarded, his statement seems to overlook the fact that the jury were more than witnesses; they were triors as well; and the explanation of their number being usually greater than the scriptural "two or three" lies probably in those historical considerations to which Brunner (Schw. 112) refers, such as the desire to make up not merely by quality but by quantity for the lack, in the case of the jury, of that amenability to counter proof and the battle which sometimes existed in the case of the older witnesses.[4]

In 1286 the jurors in an assise (probably of novel disseisin) were unevenly divided,[5] but the judgment is given in these words: *et quia dicto majoris partis jur. standum est, consideratum est,* etc.[6] This doctrine of giving judgment with the majority is laid down generally, in the trial of felony, by Britton (12 b): "If they cannot

[1] As to this rule, see Best, Evid. ss. 597–600.

[2] For Brunner's very interesting account of all this, see Schw. 364–371; he cites Bracton, 184 b, 255 b, and 179 b. The last citation relates to the mortdancestor, and runs thus: "The assise is to proceed by twelve jurors . . . and not fewer, as it may in the assise of novel disseisin, by seven at least. . . . And so here let the assise proceed by twelve at least." In the French use of the inquest, the principle of a majority decision prevailed.

[3] c. 3, s. 34; compare c. 5, s. 1, 136.

[4] Harv. L. Rev. v. 51–52.

[5] "*X jur. dicunt unum, et* xi. *dicunt alium contrarium,*" says the account in Pl. Ab. 279, col. 1, Kanc. We must surmise that the xi. is a misprint for ii.

[6] Compare a case of 1199 in Rot. Cur. Reg. ii. 105; s. c. Pl. Ab. 23, col. 2, Suff.

agree let them be separated and examined why. If the greater part know the truth and a part not, let judgment be given with the majority." In 1292 (Pl. Ab. 286, col. 2) it appeared that certain justices, four years before, had given judgment on a verdict of eleven jurymen, obtained by removing the twelfth, who would not agree. In 1318–19, Bereford, C. J., when the twelfth juryman on an inquest had not appeared, asked the parties whether they would agree to going on with eleven? The reporter notes it as a question, whether this can be done by assent in "pleas of assise and attaints."[1] Fifty years later, on the taking of an assise, one juryman would not agree with the other eleven. The justices took a verdict from these and imprisoned the twelfth.[2] On moving for judgment, counsel urged that it had formerly been adjudged in trespass that a verdict of eleven might be good, "and this we will show you by record." Thorpe, C.J.: "It is fundamental (*la ley fuit fondue*) that every inquest shall be by twelve . . . and no fewer. . . . Though you bring us a dozen records, it shall not help you; for those who gave judgment on such a verdict were greatly blamed." Moubrey, J.: "Since the verdict was by eleven and judgment cannot be rendered, sue out a new inquest and let the man imprisoned be discharged."[3] The requirement of twelve in the petty jury, unless by consent, and the need of unanimity, seemed now to have become the settled rule.

3. As to informing the jurors: (*a*) In the first place, they were men chosen as being likely to be already informed; in this respect, as well as others, they were a purged and selected body. I pass by the matter of precautions taken, by way of challenge and otherwise, to keep off persons unsuitable by reason of favor to a party, or of want of property or social standing. Always they were from the neighborhood — *de visineto.* This expression was not precisely defined, beyond its meaning from the same county; but in practice it went much further. It became the practice to require that a certain number of the jury should come from the particular hundred in question; and these men were expected to inform the others. In an important case of 1374, Belknap, C. J., says: "In an assise in the county, if the court does not see six, or at least five, men of the hundred where

[1] Y. B. 12 Ed. II. 373.

[2] In 1202 (Seld. Soc. Pub. iii. case 241) one juryman differing from the eleven was fined.

[3] Y. B. 41 Edw. III. 31, 36.

the tenements are, to inform the others who are further away, I say that the assise will not be taken. *A multo fortiori*, those of one county cannot try a thing which is in another county." (Y. B. 48 Edw. III. 30, 17; s. c. Lib. Ass. 315, 5.) A statute of 1543 (35 H. VIII. c. 6, s. 3) required six hundredors. In 1585 (St. 27 Eliz. c. 6, s. 5) this was reduced, in personal actions, to two. "The most general rule," said Coke, early in the seventeenth century, "is that every trial shall be out of that town, parish, or hamlet . . . within which the matter of fact assignable is alleged, which is most certain and nearest thereunto." (Co. Lit. 125.) Much trouble was caused by going into this detail, and at last in 1705 (St. 4 Anne, c. 16, s. 6) it was enacted that in civil cases it should be enough to summon the jury from "the body of the county." In criminal cases the same result appears to have been worked out in practice.[1] Of the conceptions, as to this matter, of the earlier period, we may see a lively illustration in the passage which I place in a note, from Sir Francis Palgrave's "The Merchant and the Friar" (1837), in which, under the guise of a pleasant fiction, he presents curious details of English life in the thirteenth century.[2] Long afterwards it was regarded as the right of the parties to "inform" the jury, after they were empanelled and before the trial. In 1427, we read in the St. 6 H. VI. c. 2, that in certain cases the viscounts must furnish the parties with the jury's names six days before the session, if they ask for it, since (it is recited as a grievance) defendants heretofore could not know who the jury were, "so as to inform them of their right and title before the day of the session," (*pur eux enformer de lour droit ett itles devaunt, etc.*). This statute throws light upon the earlier general statute of

[1] For details as to this, see Note 191, Co. Lit. 125.

[2] These are being explained, so he fables, by an English friar, Roger Bacon, to an Italian merchant, Marco Polo, while showing the stranger over London. They are at Guildhall, and the trial of one of the alleged robbers of the king's treasury, in 1303, is beginning. "Sheriff, is your inquest in court?" said the mayor. "Yes, my Lord," replied the sheriff; "and I am happy to say it will be an excellent jury for the crown. I myself have picked and chosen every man on the panel. . . . There is not a man whom I have not examined carefully. . . . All the jurors are acquainted with [the prisoner]. . . . I should ill have discharged my duty if I had allowed my bailiff to summon the jury at haphazard. . . . The least informed of them have taken great pains to go up and down in every hole and corner of Westminster,— they and their wives,— and to learn all they could hear concerning his past and present life and conversation. Never had any culprit a better chance of having a fair trial," etc.

42 Edw. III. c. 11 (1368), mentioned in 3 Bl. Com. 353. Probably Coke's remark about it in 3 Inst. 175, that both parties must be present when this information was given, are a modern gloss; although, doubtless, a party had to keep inside the law of embracery.

It was a little later than the time of Palgrave's story when Thomas Makerill and his brother, in 1317, were arrested for assaulting an officer of the court in "Fletestrete," and twelve men of the court, in whose presence this took place, and also twelve men of the *visne* of "Fletestrete" were summoned for a jury (Pl. Ab. 331, col. 1). About 1356, when a judge of the Common Bench complained in the Exchequer against a woman for calling him "traitor, felon, and robber," the case went to an inquest of "attorneys of the Common Bench and the Exchequer" (Lib. Ass. 177, 19).

(*b*) These cases illustrate a very common method of securing for the jury a better knowledge of matters in issue, viz., that of combining men of different *visnes*, who might inform each other. This existed in Normandy; and we notice it in our own earliest records, as in 1199 (Rot. Cur. Reg. ii. 10). A remarkable instance of the use of separate juries for amassing their several contributions of knowledge by separate verdicts is found in the proceedings on occasion of the great robbery of the royal treasury at Westminster Abbey, in 1303. Mr. Pike, to whom we owe this information, cites the case as illustrating the progress made in separating the accusing and the trial jury (Hist. Crime, i, 198–200; 207–8,466). The king appointed a commission of inquiry. "A jury was empanelled for every ward of the city of London, and for every hundred of Middlesex and Surrey — and in addition to these there was a jury of goldsmiths and aldermen." They charged certain persons. Five justices were then directed to try the accused. "Juries were summoned from the same hundred and wards as before, but in obedience to a different commission." It is not clear, in this case, just how the separate juries were used at the trial. In general, separate panels in such cases were combined in one. In 1230 (Br. N. B. ii, case 375), seven from Surrey and seven from London were united into one jury by consent. It was the practice, later on, at any rate,[1] where two panels were sum-

[1] As in 1402, Y. B. 4 H. IV. 1, pl. 2; and in 1619, Hob. 330.

moned from different counties, to choose one juror alternately from each.

(*c*) Moreover, as among eligible persons, there seems always to have existed the power of selecting those especially qualified for a given service. Jurors are summoned not merely from closer or less close neighborhoods, but from the *senioribus et legalioribus*, as asked in 1198 (Rot. Cur. Reg. i. 354); and from experts and men of particular trades, like the London juries of cooks and fishmongers, where one was accused of selling bad food.[1] What we call the "special jury" seems always to have been used. It was a natural result of the principle that those were to be summoned who could best tell the *veritatem rei.* And so we read that in 1645–6, in the King's Bench, . . . "The court was moved that a jury of merchants might be retained to try an issue between two merchants, touching merchants' affairs, and it was granted, because it was conceived they might have better knowledge of the matters in difference which were to be tried than others could who were not of that profession" (Lilly's Pract. Reg. ii. 154).

In some cases this selection was regulated. In the grand assise, as we have seen, knights were regularly the jurors. So in the jury of attaint (Bract. 291). In 1323 (Fitz. Ab. Attaint, 69), when it was objected that there were no knights on the jury, Herle, J., said, "You never saw such a jury taken without a knight," and ordered a *venire facias* of knights and others. In Coke's time (Inst. 156), we read that "in an attaint there ought to be a knight returned of the Jury."[2]

Trials at bar often required special juries. Indeed, Blackstone (iii. 357) is willing to say that "special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent

[1] Ryley, Mem. London, 266 (1351); ib. 536 (1394); Palgrave, Merch. and Friar, 190–194. The jury of the "half tongue," *de medietatem linguæ*, was founded on considerations of policy and fair dealing, rather than a wish to provide a well-informed jury. See "Ordinance of the Staples," 27 Edw. III. st. 2, c. 8 (1353); and St. 28 Edw. III. c. 13 (1354).

[2] The challenge for this defect is supposed to have been abolished in 1751 by St. 24, Geo. II., c. 18, s. 4, although the recital in this section deals with another sort of case. In Blackstone's time (Com. iii. 351), the rule in attaint was "twenty-four of the best men in the country."

causes as to warrant an exception to him." The itinerant method of administering justice as it developed into the *nisi prius* system resulted in sending down most actions to be tried in the counties rather than at Westminster (Bl. Com. iii. 352–4); but in 1285, in regulating this system, it was expressly provided (St. West. II. c. 30): *Sed inquisitiones de grossis et pluribus articulis, qui magna indigeant examinatione, capiantur coram justiciariis de bancis, nisi ambae partes,* etc.[1] For the handling of these greater and more complicated causes, there was picked out a better class of jurymen; or at least there was allowed to the parties themselves a considerable hand in the selection.[2]

As regards special juries in general, we seem to observe the transition from the older, unregulated system to the modern one soon after a case in 1724,[3] where, on a motion for a special jury in the King's Bench, and a question whether this could be had without consent of the parties, "the master of the office was ordered to search for precedents, and he reported that about thirty years ago there were several precedents for special juries upon trials for nice points, without the consent of the parties, but that in the last thirty years there were several motions made for that purpose, but always denied. . . . Three of the judges (out of four) were of opinion that a special jury might be granted to try a cause at bar without the consent of the parties, but never at the *nisi prius* unless very good cause was shewed (and not shown here); therefore, since the high sheriff is the proper officer to return juries, and there is no imputation against him . . . the court would not vary from him without the consent of the parties." Thereupon, by a declaratory statute in 1730 (Stat. 3 Geo. II. c. 25, s. 15), it was enacted that either party in any case, as well criminal as civil, may have a special jury on motion

1 And so in 1699 (Lord Sandwich's case, 2 Salk. 648), per Holt, C. J. "Where there is value or difficulty, we are bound of common right to grant trials at the bar," citing this passage from Stat. West. II.

2 In 1661 (Wheeler *v.* Honour, 1 Keble, 166) we read: "which Windham, J. agreed: and trials at bar are to the end to have the most discreet persons, and therefore to clap on ordinary persons upon a tales in such cases was not fitting." In 1738 (Smith d. Dormer *v.* Parkhurst, Andrews, 315), on a question of granting a new trial, after a trial at bar, counsel argue: "The evidence of one or two witnesses ought not to overturn the finding of twelve gentlemen of figure and fortune, who might, too, be governed by their own knowledge."

3 The King *v.* Burridge, 8 Mod. 245.

at his own expense. And the matter was further regulated by later acts.

(*d*) From the beginning of our records, we find cases, in a dispute over the genuineness of a deed, where the jury are combined with the witnesses to the deed. This goes back to the Franks; and their custom of requiring the witness to a document to defend it by battle also crossed the channel, and is found in Glanville (lib. x. c. 12). As regards these earlier details, and the significance and relation to the old law of this fact of allowing one's self to be thus preappointed as a witness, I must merely refer to very interesting passages of Brunner.[1] In these cases the jury and the witnesses named in the deed were summoned together, and all went out and conferred privately as if composing one body; the witnesses did not regularly testify in open court. Cases of this kind are found very early, *e. g.* in 1208–9 (Pl. Ab. 63, col. 1, Berk.). In 1208 (ib. 56, col. 2, Suff.), there is an offer of the defendant to put himself on *legalem juratam patrie*, and on the witnesses to a deed, eleven of whom are named, and it is added, *et alii multi*. Some light is thrown on the conception at the bottom of this introduction of so many names as witnesses, when we observe that people wrote in the names of absent friends and got their consent afterwards. It was only a few years after these cases when one of John's barons, being in prison and desirous of raising money, wrote to three distinguished friends asking, as they could not be present at the execution of his deeds, and as he had written in their names as witnesses, that they would consent to this.[2] A witness to a deed, according to the popular conception, was not necessarily one who had seen it executed, but one who was willing to give it credit by his name. This may account for its turning out so often, when witnesses were questioned, that they knew nothing about the matter.

In 1219, the parties put themselves on the witnesses and a jury. The order is "*fiat inde jurata per* . . . (seven witnesses) *et per* . . . (nine others) *et veniat* . . . *ad recognoscendum*," etc.

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[1] Schw. 197–8; ib. 434–6. Brunner cites the case of Bishop Wulfstan *v.* Abbot Walter, which is in Big. Pl. A. N. 16, 287; s. c. Essays in Angl. Sax. Law, 377.

[2] *Quia ad cartas faciendas* . . . *presentiam vestram habere non potuimus precamur* . . . *ut de cartis nostris in quibus ob securitatem obtinendam testes estis ascripti, testes esse velitis.* Ellis's Letters, 3d Series, i. 25.

(Br. N. B. ii. case 51). The jury, it will be noticed, is said to be composed of the two; and as the jury proper are often questioned by the court in giving their verdict, so the witnesses are sometimes thus questioned separately. A very interesting instance of this occurs in 1236,[1] where the whole combination answers that they never heard of the deed till it was brought and read publicly to the county court and the persons named in it were asked to give testimony. Then the witnesses are questioned separately, and all but three say this again and add that they never knew that they were named till in the county court. Three, differing somewhat from the others in their account, say that they had seen the deed several years ago, and had been asked by the maker to be witnesses and furnish testimony. As to seisin, the three say that they know nothing more than what they have answered *cum aliis juratoribus in communi.* Then all, *tam juratores quam testes,* are questioned as to something else, and say they do not know, but rather think, (*melius credunt*) etc. Asked how they know that the said Abbot was not seised, . . . they say that they know this well and it is very clear because the same G. enfeoffed a certain R. of the site of a horse-mill at Michaelmas, etc. And more of the same sort.[2] In 1318,[3] on a question arising incidentally in an action of trespass as to an alleged release of the plaintiff, the parties put themselves on a jury and on the four witnesses named in the deed. The jury answer, that they have examined the witnesses, that these differ, and they cannot make out from this examination what the fact is. But they give reasons for suspecting the credibility of the witnesses, and therefore make their definite answer (*dicunt precisè*) that the release is not the plaintiff's deed. The justices then, *ut rei veritas . . . apercius et evidencius sciretur,* immediately question the four witnesses separately, in curious detail; they find them discordant, and give judgment on the verdict.[4]

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[1] Bracton, N. B. iii. case 1189.

[2] See also a good case in 1227 (Br. N. B. ii. case 249), where four witnesses and nine jurymen are summoned. Separate answers are recorded.

[3] Pl. Ab. 331, col. i. London; s. c. *MS.* copy from the Record Office.

[4] "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time how and when, and other necessary circumstances touching the deed." They were discordant and untrustworthy, "for [continues the record] three of the said witnesses . . . said before the justices that they were not present at the making, or sealing, nor ever saw the deed or

In the earlier cases these witnesses appear, sometimes, to have been conceived of as a constituent part of the jury; it was a combination of business-witnesses and community-witnesses who tried the case, — the former supplying to the others their more exact information, just as the hundreders, or those from another county, did in the cases before noticed. But in time the jury and the witnesses came to be sharply discriminated. Two or three cases in the reign of Edward III. show this. In 1337, 1338, and 1349[1] we are told that they are charged differently; the charge to the jury is to tell the truth (*a lour ascient*) to the best of their knowledge, while that to the witnesses is to tell the truth and loyally inform the inquest, without saying anything about their knowledge (*sans lour scient*);[2] "for the witnesses," says Thorpe, C. J., in 1349, "should say nothing but what they know as certain,

knew of it until on a certain Thursday they came all together to the manor . . . and found there this said Richard, who showed them the said writing and said it was his deed. Each of them was asked, separately and by himself, at what hour they came there, and in what building in the manor Richard showed them the writing, and how he was dressed. One of them said that they came there in the morning before sunrise, and that the writing was shown to the four witnesses in the queen's chamber of the manor; and Richard was dressed in a German tunic *de Medleto*, and was shod in white shoes. The second said that they came at six o'clock (*hora diei prima*) and the writing was shown to the four witnesses at this hour, in the hall of the manor. The third said that they came, all at the same time, at nine o'clock (*hora diei quasi alta tertia*) and Richard showed them the writing in the stable of the manor, and he had on a black cloak. The fourth witness, William de Codinton, said that he never came to the manor with the said three witnesses, and never knew or heard of the making of the writing, or whether it was or wasn't Richard's deed, except from the report of the three witnesses, who gave him to understand, and swore to it, that the writing was Richard's deed." The judgment was against the deed, reciting the jury's verdict and the worthlessness of the witnesses' testimony.

[1] Y. B. 11 & 12 Edw. III. 338; Lib. Ass. 34, 12; and Lib. Ass. 110, 11.

[2] "It is an abuse," says the Mirror, a little earlier than this, "to use the term '*a lour escient*' in the oath, and make jurors decide upon thoughts (*quiders*), since the principal word in their oath is that they will say the truth." c. 5, s. 1, 135. Professor Maitland, to whose labors legal scholars are so greatly indebted, in giving some account of the earliest (manuscript) Register of Writs which he has seen, one of 1227 (3 Harv. Law Rev. 97, 110 et seq.), prints from it an interesting note relating to the grand assise. "*In hac assisa non ponuntur nisi milites et debent jurare precise quod veritatem dicent, non audito illo verbo quod in aliis recognitionibus dicitur, scilicet a se nescienter.*" Doubtless, as Maitland suggests, this last is a misreading of the barbarous law French *a son ascient*. This passage helps us to see exactly what Shareshulle, J., meant in the next century, when he said (Y. B. 11 & 12 Edw. III. 341), of the witnesses, *lour serement est a dire verite tut atrenche, auxi com ils sunt jurez en un graunt assise, et nemye a lour ascient.* Of the queer phrase, *tut atrenche*, Selden surmises that it is a corruption from *tout oultrance*. Note 43, Hengham Magna, c. xii.

i.e., what they see and hear. If a witness is returned on the jury, he shall be ousted. A challenge good as against a juryman is not good against a witness. If the witnesses and the jury cannot agree upon one verdict, that of the jury shall be taken, and the defeated party may have the attaint against the jury; had they followed the information of the witnesses the attaint would not lie, unless they found against the deed." In that case it might, for it was conceived that a negative could not be certainly known to the witnesses. This method proved inconvenient. Among other reasons, the number of the witnesses was often large. So long as the trial could not proceed without them, there was great inconvenience endlessly; and the twelve jurymen made quite enough of that. Accordingly by the statute of York (12 Edw. II. c. 2), in 1318, it was provided that while process should still issue to the witnesses as before, yet the taking of the inquest should not be delayed by their absence. In this shape the matter ran on for a century or two. By 1472 (Y. B. 12 Edw. IV. 4, 9), we find a change. It is said, with the assent of all the judges, that process for the witnesses will not issue unless asked for.

As late, certainly, as 1489 (Y. B. 5 H. VII. 8) we find witnesses to deeds still summoned with the jury. I know of no later case. In 1549–50 Brooke, afterwards Chief Justice of the Common Bench, argues as if this practice was still known:[2] "When the witnesses . . . are joined to the inquest," etc.; and I do not observe anything in his Abridgment, published in 1568, ten years after his death, to indicate that it was not a recognized part of the law during all his time. It may, however, well have been long obsolescent. Coke (Inst. 6 b) says of it, early in the seventeenth century, "and such process against witnesses is vanished;" but when or how he does not say. We may reasonably surmise, if it did not become infrequent as the practice grew, in the fifteenth century, of calling witnesses to testify to the jury in open court, that, at any rate, it must have soon disappeared when that practice came to be attended with the right, recognized, if not first granted, in the statute of 1562–3 (5 Eliz. c. 9, s. 6), to have legal process against all sorts of witnesses.

(*e*) But in the earlier times there were other combinations of

[1] See also Lib. Ass. 243, 23(1366).

[2] Remiger *v.* Fogossa, Plow. 1, 12

the community-witnesses who ordinarily composed the jury, with business-witnesses and the like. In 1225 (Br. N. B, iii. case 1041), on a question of villeinage, six are summoned from the neighborhood *ad recognoscendum cum parentibus . . . quas consuetudines*, etc. In 1226 (ib., case 1707), on a question relating to a partition, the viscount is ordered to find out who were present at the partition *et ex illis et aliis venire faciat xii., etc., ad recognoscendum*, etc. In 1227 (ib., case 1919), in a case of dower, the viscount is directed to find out who were present at the endowing and from these and others to summon twelve.[1] In an interesting case of 1323 (Y. B. Edw. II. 507), in a case of dower *assensu patris*, counsel for plaintiff says: "We put forward a deed which testifies the assent; but that naturally lies *enproeve* (*i.e.*, in proof by witnesses) and not *en averrement* (*i.e.*, proof by jury), for it is not in the conusance of the country but of those who were present, and we are ready to aver the consent by them and others (*i.e.*, by a jury with them). . . . Bereford, C. J. We have nothing to do here with the witnesses named in the deed, for it is not denied; but we will cause those to come whom you will name as present when you were endowed, together with a jury (*ovesque bon pays*). Ald. (for defendant). That will be hard, for he may name *ses cosyns et ses auns*, who by his procurement will decide against us." But it was allowed.[2] This sort of thing seems to have been a mingling of the old procedure and the new. The proving by witnesses present at the endowing was the old *lex recordamenti*. An account of it in Normandy is found in Brunner (Schw. 342–3). A case of 1236–7 (Br. N. B. iii. case 1187) probably belongs to this class, where on a question relating to an alleged gift and seisin of a manor by the father of a tenant in capite now claiming it, the viscount is to summon twelve from the visne of the manor *ad recognoscendum utrum . . . dedit . . . et . . . fuit in seisina . . . et quod venire faceret coram predictis liberos homines . . . ad recognoscendum utrum, etc.* It seems probable that this passage is corrupt and should read *cum predictis*.[3]

[1] For the form of the writ, see Bracton, 304 b. Other cases are Br. N. B. ii., cases 91, 154. See also ib., case 456; s. c. ib., case 595 (1230); ib., case 631 (1231); Bracton, 380.

[2] See also a case of 1315, Y. B. Edw. II. 278.

[3] The original roll is not extant (Br. N. B. i. 161); but Professor Maitland, the editor of the Note Book, who did me the great kindness of examining that again at the British Museum, declares that there can be no doubt that the copyist has made it *coram*.

Before leaving this class of cases, it is interesting to notice that two centuries ago the Puritans of our Plymouth Colony used now and then, out of policy, when they were trying a case relating to an Indian, to add Indians to the jury, as in a criminal case in 1682.[1]

(*f*) Our earliest records show the practice of exhibiting charters and other writings to the jury. These things, *par excellence*, used to be known as "evidence" and "evidences." In a great degree, they belonged to the stage of pleading, — in so far as they were wholly or in part the ground of action or defence, or a negation or qualification of it. A record, and so a fine or recognizance, or a charter under seal, bound one who was a party to it and sometimes one who was not. Should such a thing be produced in pleading, the execution of it must be admitted or denied. If admitted, that was the end of the matter. If denied and put in issue, then the question was on the genuineness of it, not on its truth or operative quality. Such documents, if admitted, must be met by others of equal force. When the pleadings were over, it might well be that they should be shown to the jury in illustration of the exposition made to the jury by counsel; in fact, this was often done, "to inform the jury." Other documents also were shown to the jury, — any which might illustrate or support the statements of counsel. And these statements themselves were "evidence." It must be closely held in mind that all through the period when the jury went on their own knowledge, they listened to perfectly unsupported narratives of fact from counsel, not under oath.

How if one who should have pleaded a charter or record did not plead it, relying, perhaps, on the jury, who might know of it? Could they find a matter of record or a deed without having it shown them? If they knew of it, must they find it, — being sworn to tell the truth? And how if they know the fact to be otherwise than as this deed or record represented it? How if they knew the fact to be otherwise than as the pleadings represented it? Were they not perjured if they did not tell the truth? These

[1] Plym. Col. Records, vi. 98. So in 1675 (ib. vol. v. 167–8), six Indians were added to the jury of twelve, on the trial of three Indians for the murder of another Indian. "It was judged very expedient by the Court that . . . some of the most indifferentest, gravest and sage Indians should be admitted to be with the said jury, and to help to consult and advise with, of and concerning the premises." The verdict ran thus: "We of the jury, one and all, both English and Indians do jointly," etc.

were serious questions, and some of them troubled the lawyers for centuries.[1]

Let us look at some of the cases: In a case of about the year 1200,[2] the jury, if we may trust a lively and intelligent chronicler, made short work of a charter. The plaintiff claimed seisin of certain lands in right of a ward, as her inheritance; the defendant relied on a deed of the father of the ward. The deed was read to the assise in open court. Their verdict, as it is reported, was "that they knew nothing of our chartularies or private agreements (*juramento facto, dixerunt milites se nescire de cartis nostris, nec de privatis conventionibus*), but that they believed that Adam and his father and grandfather, for a hundred years back, had held the manors in fee one after the other. And so we were disseised by the judgment of the court."

In our earliest reports we find the use of documents merely as evidence to the jury. In 1294 (Y. B. 22 Edw. I. 450), there is a case in which a doctrine was applied which had led to a struggle a little earlier (ib. 428), viz., that although one had lost in a possessory assise, this was no bar to his recovering, in a writ of right. In an assise of mortdancestor, where the tenant's defence was that plaintiff's ancestor had enfeoffed him by a charter and did not die seised, the assise found this true, and gave their verdict for the tenant. The demandant, nevertheless, brought a writ of right and was upheld in it, and it was said that the defence must be by battle or the great assise and not by the charter: "Yet the charter may be put forward as evidence (*en evidence*) to the grand assise."

Where a charter gave a ground of action or defence, it must regularly, as we said, be pleaded, for if admitted, it might save going to the assise; if it were not pleaded, one would not regularly use it in evidence to the jury. But the jury would, perhaps, be helped by having it put in evidence; and they could have it if they wished. In 1292 we find this stated in a note by the re-

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1 The perplexities that were caused sometimes by conflicting charters (forgery even by holy men was very common) are shown by the exclamation of Henry II. when they produced charters before him on both sides: "*Iste carte ejusdem antiquitatis sunt et ab eodem rege Aedwardo emanant. Nescio quid dicam nisi ut carte ad invicem pugnent!*" Big. Pl. A. N. 239. The point of Henry's joke lay in its hint at the Norman method when opposing witnesses differed. Harv. L. Rev. v. 52.

2 Forsyth, Tr. by Jury, 129–130, citing Jocelyn de Brakelonde.

porter, which is given below.[1] Of course this in principle is just as much helping the jury by evidence as if a witness came before them to testify. The fact that they might be ignorant of such things was noticed in the Stat. West. II. c. 25, in providing against certain dangers from the *festinum remedium* of the novel disseisin: If the defendant against whom the assise may have passed in his absence afterwards show the justices charters or releases "in which the jury were not examined, nor could be, because not mentioned in pleading, and probably they might be ignorant of such writings," — the jury and the parties were to be resummoned. (Y. B. 13 Edw. III. 80.)

In 1339 (Y. B. 13 Edw. III. 80), Scharshulle, J., is reported as saying that since a warranty requires a specialty, if it be not pleaded or put in evidence, a finding of it by the assise shall not hold. It was the rule in attaint, as well before as after witnesses were allowed to testify to jurors, that the plaintiff should give nothing in evidence to the "grand jury," as they called it, additional to what the first jury had had; for the question was whether, upon what these knew and ought to know, their verdict was false.[2] In 1351–2 (Lib. Ass. 121, 12), counsel complains of his adversary in attaint, that he is putting forward in his pleading a release not pleaded in the first case, of which, therefore, the first jury could not have had cognizance. But he is answered that there was no opportunity to plead it, and that it *was* given in evidence to the former jury.

A distinction was made between sealed writings and others. The former were regarded as authenticated by the seal; the others were not "authentic." Yet, just as counsel might freely make statements of fact to the jury, unsupported otherwise, so they might exhibit to them unsealed writings. The jury could carry out with them only writings under seal. The presence of the writing at the private consultation of the jury seems to have been conceived of as if it were a witness to a deed, or one of those who testified to a view, or those present at the giving of

[1] "NOTE.— If a charter be put forward to inform the assise after they are sworn and charged, the charter will not be received unless the assise ask for it. To have the charter inform the assise, one should plead on the charter and say this: 'He did not die seised, etc., for he enfoeffed us by this charter, and then put forward the charter to inform,'" etc. (Y. B. 20 Edw. I. 20.)

[2] Brooke, Ab. Attaint, 68; Rolfe *v.* Hampden, 1 Dyer, 53 b (1542); Heydon *v.* Ibgrave, 2 ib. 129 b (1556).

dower; it must be only an "authentic" paper that could testify there. And so in 1352 (Lib. Ass. 120, 4) we find that on a question as to the prescriptive title to tithes of the Master of St. Cross at Winchester, an ancient register of tithes, of a hundred years back, was put forward in evidence, and because it was not sealed the jury only inspected it and gave it back before they went out.[1]

One or two more cases may be cited in order to bring down the showing of documents to the jury to the modern form. As the practice of submitting writings to them was far older than that of admitting ordinary witnesses, so the conditions and qualifications of it were earlier fixed. In 1340 (Y. B. 14 Edw. III. 25–34), the assise, in novel disseisin, had found in a special verdict that the tenant had previously brought an action for the same land and had recovered; the tenant had pleaded this, but had not produced the record. The judges asked the jury how they knew this, "since" (to quote the record) "pleas and judgments of the king's court are of record and outside the notice and cognizance of a jury of the country. They said that they had not any certain knowledge (of it) . . . and would not positively say that there was such a plea, . . . but by reason of the summons and resummons . . . and the view . . . and its being commonly said in the country that there was such a plea and such a judgment rendered in the said form, and because the viscount had a writ . . . to put the said John . . . in seisin, as he said, and did put him in seisin, they understood that there was such a plea and such a judgment rendered between the said parties." The report adds: "Scharshulle, J. The assise has expressly said (&c.) . . . and what they say about a recovery does not lie within their cognizance," etc. It turned out that the jury were substantially right; there was such a record, but owing to a slight variance between the form of it and the pleading, judgment was finally given for the plaintiffs.[2]

It was, then, as it would seem, improper for a jury to find spe-

[1] Gawdy, J., in Vicary *v.* Farthing, Cro. El. 411 (1595) said, "It is also clear that writings or books which are not under seal cannot be delivered to the jurors without the assent of both parties." This was law in New Jersey down to 1797. State *v.* Raymond, 21 Atl. Rep. 328 (Feb., 1891). We find it laid down still in Lofft's Gilbert (ed. 1795), i. 21, accompanied by that sort of baffling and inadequate reasoning which Gilbert often sets forth regarding matters not understood.

[2] See Mr. Pike's careful statement of the case (Introd. xxxvii-xl).

cifically matter of record without evidence.[1] And in 1419–20,[2] in a case much debated, it was held, with some difference of opinion among the judges, that a jury cannot in a special verdict find a deed which has not been pleaded or given in evidence: "Hull [J.], This deed is only the private intent of a man, which can be known only by writing; and if the writing be shown, it may lawfully be avoided in several ways, as for *non sane* memory, being within age, imprisonment, or because it was made before the ancestor's death, and the like — things which the party cannot plead unless he have oyer of the deed, and it be shown."

An important step in the use of writings to the jury is recorded in a case of 1409 (Y. B. 11 H. IV. 17, pl. 41), "The plaintiff in an assise gave a writing (*escrowment*) to a juror who had been empanelled, as evidence of his matter.[3] After the juror with the others was sworn and put in a house to agree on the verdict, he showed the writing to his companions; and the officer in charge of the inquest stated the matter to the court. Whereupon the justices took the writing from the jurors, took their verdict, questioned the jurors as to the time of giving the writing, and found as stated above. The plaintiff had a verdict, and now prayed his judgment. Gascoigne, C. J., and Huls, J., said that the jury, after they were sworn, ought not to see or take with them any other evidence than that delivered to them by the court and put forward by the party in court on the showing of his evidence. And since he did the contrary . . . he should not have judgment. The plaintiff said that the writing proved merely what he had given the jury at the bar, and so it was not bad, as he did not speak to them *en evidence. Et non allocatur.*" It has been justly remarked by Starkie[4] that "the exercise of this kind of control was in truth the foundation of that system of rules concerning evidence before juries which has since constituted so large and important a branch of the law of England."[5]

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[1] Br. Ab. Assise, 258. But it was competent for a jury, at the peril of the attaint, to find a general verdict which might cover such a matter, and might rest merely upon their general knowledge of it. In this case, for instance, if they had chosen, they could have answered definitely (*precisè*), no disseisin. See Vin. Ab. Trial, Q. f.

[2] Y. B. 7 H. V. 5, pl. 3.

[3] See *ante*, p. 298.

[4] "Trial by Jury," Little & Brown's ed. 39; reprinted from (English) Law Review, ii.

[5] For a good illustration of this sort of control, see Y. B. 21 Edw. IV. 38, 1.

(*g*) There were other ways of informing the jury. Of guiding and restraining them I shall say more hereafter. The judge gave them their "charge," and each party or his counsel explained to them his contention. In our earliest reports a charge from the judge precedes the statements of counsel. In the first case in our extant Year Books (20 & 21 Edw. I. 3; A.D. 1292), there is a charge to the jury, but no report of any address on either side. In the same volume and year, in an assise of mortdancestor, the defendant is told by the judge to omit something from his oral pleading and plead only to the points of the assise: "What you say about your pledges (*dites ceo en evidence de lasise*), say it in evidence to the assise." In 1302, after the "great assise" was sworn, Berewyk, J. (Y. B. 30 & 31 Edw. I. 116–118), said to them: "John de Kilcayt heretofore brought a writ of right against William de Bodom and demanded eighteen perches, &c.,[1] whereupon W. came and put himself on God and the great assise. We have (not)[2] the record, how they pleaded. You have nothing to say except only what you are charged with — as to the right." Then Mutford (counsel) speaks for John, setting forth that J.'s grandfather was seised of the land "as of fee and right," that it descended to his son John and from him "to this John who demands it as his son. And such is his right." Hunt then speaks for William: "This same John enfeoffed G. of the advowson of the church of C. with its appurtenances; and this land is appurtenant to the church of C. And this is William's right and the right of his church." The great assise then went out.[3] Of the same period (ib. 528), is a charge in a criminal case. One W., the stabler of J.'s horse, had been kicked while trying to mount

[1] This "&c." appears to be explained by the words of the oath which are given: "Hear this, ye justices, that I will tell the truth and will not fail, who has the better right in eighteen perches of land and the third part of seven acres of land with the appurtenances in N., whether William Bodom, parson of the church of C., to hold in right of his church at C. as he holds, or J. Kilcayt to have as he demands, so help me God," etc.

[2] One of three manuscripts used in preparing this volume, as we are told (p. 119, note; compare ib. xlix), says "we have;" the others, "we have not." The former reading seems the more probable.

[3] The report closes thus: "The great assise went out. Then came back two knights and wished another knight. Berewyk [J.] to the marshal,— 'Don't allow any of them to come in unless all come together.' The great assise: 'Sir, we say that W. has better right to hold as he holds, than his adversary as he demands.' Brumpton [J.]. 'Therefore the court awards that W. retain the same land as his right and the right of his church of C. to the end of the world (*a remenaunt de monde*), quit of J. and his heirs forever; and that J. be in mercy.'"

him, so that he died. J. has been charged by the jury of accusation with retaining his horse, although he had thus become a *deodand*, and with having buried W. without calling in the coroner. He denies both charges and puts himself on the *patria*. The judge, turning, probably, to the same jury that had accused the defendant, replies: "*Ecce hic bona patria de duodecim.* Read the names and save him every sufficient challenge." Some challenges were made, *que triebantur per residuos de duodecim.* The judge proceeds to charge the jury thus: "If W. died from the kick of the horse, the horse would be *deodand.* If not it would be John's. If the king should lose through you what rightly belongs to him, you would be perjured. If you should take away from John what is his, you would commit a mortal sin. Therefore, by the oath you have made, disclose and tell us the truth, whether the said W. died of the horse's kick or not. If you find that he did, tell us in whose hands is the *deodand* horse and what he is worth; and whether the said W. was buried without a view of the coroner."

It will be noticed that the charge had the effect not merely to bring clearly to the jury's mind what they were to pass upon, but also to prevent their wandering away into irrelevant matters — matters not in issue. Exactly what might have been admitted by the pleadings, or what was the scope of the issue, it was not always easy to say. It was for the judges to keep the jury within proper limits. "Good people," said Bereford, J., in Y. B. 34 Edw. I. 166 (1306), "you have only to inquire whether any of the predecessors of the aforesaid Prior presented the last person," etc.[1]

(*h*) We find early in the Year Books the beginning of a discussion which is forever going on in the fifteenth century, as to how far one can go in his pleading; what should be pleaded, and what is merely "evidence" of the facts to be pleaded; what shall be entered on the record, and what shall be left to be "said in evidence to the jury." We say nowadays that "facts" are to be pleaded, and not the evidence of facts. That was early said, but it was very far indeed from being rigidly enforced. Often we find the courts allowing one to set forth his case fully, "for fear of the laymen," *i. e.*, in order that the jury might not pass upon questions of law, and might not go wrong through any misapprehension of the

[1] And so, in Y. B. 30 Edw. I. 132, Brumpton, J., after reciting the process: "Good people the points of the assise are agreed on. You have only to say," etc.

facts. Much "evidence" was thus entered on the records; once there, it got recited to the jury when they were sent out, and was clearly brought to the notice of all who had occasion to address the jury, as well the counsel as the court. Sometimes, also, this served the purpose of preserving a memorial, in case of further litigation, of exactly what was involved in any given case. Of the last we see an instance in 1306 (Y. B. 34 Edw. I. 118–120), where a defendant found put forward against him a deed of release by his father of certain rent now claimed. He met this by a long statement, setting forth that his grandfather had a rent of double this amount; that it descended in halves to two sons; that his father, one of these, had released his rent, but subsequently his uncle's share had descended to him. He went on to admit the release, but prayed that this statement "might be entered on the roll so that we be not foreclosed on another occasion from demanding the same services. And it was granted by the court."

In 1305 (Y. B. 33 Edw. I. 100–107), the plaintiff demands tenements of the defendant, tracing title by descent from his great-grandfather. The defendant answers that the land is part of a manor of which plaintiff's grandmother was seised, and that she gave this land in tail to the defendant's father, from whom the defendant takes his inheritance. The plaintiff replied that his great-grandfather had separated from the manor the land now demanded, and given it in frank marriage to R. M., who was seised of this land until after the deed of the grandmother was given, and so she was not seised when she gave her deed. The defendant insisted that his assertion of the grandmother's seisin should be traversed as simply as he had alleged it; without limiting it to time. And Bereford, J., said to the plaintiff, "It is fit that you traverse him; and what you give in answer shall be in evidence that she was not seised because R. M. was seised; and it shall be entered and the inquest shall be charged thereon."

In 1302 (Y. B. 30 Edw. I. 228), in a similar dispute, Brumpton, J., said to the defendants, charged as owners in common with others, and setting up that the others, a husband and wife, held as the wife's dower: "Nothing shall be entered on the roll but this, viz: that you do not hold in common. But state this by way of information and evidence to the inquest." The Year Books of Henry VI., a century and a half later, are full of discussions over this matter. The judges used a large discretion as to entering

on the record evidence, *i.e.*, explanatory and probative allegations, and they give as a reason for entering it, the danger that the jury will go wrong, from not apprehending the facts and from not separating facts from law. Once entered on the record, there could be no doubt of its being brought to the jury's knowledge; and in case of an attaint, it fixed them with notice of it. Observe how this is spoken of. In 1430 (Y. B. 9 H. VI. 63, 16), where, in an action of trespass, the defendant sought to plead specially, it was refused. "We pray," says counsel, "that all may be entered for evidence. Martin [J.], You have alleged only what you can give in evidence. Paston [J.], If this matter be not entered, the party is in danger of great mischief, for where one pleads merely not guilty, the jury has no regard to the place where the trespass is done; that is the common way of jurors. Martin [J.], We cannot adjudge the law according to the understanding of jurors. If they find him guilty of trespass in another county, clearly the attaint lies for the defendant." Only a little later (Y. B. 11 H. VI. 1, 2), in an action of waste, the defendant objected to the particularity of the declaration: "It has not until lately been the practice to count so, but generally. . . . Martin [J.]. It is a good practice, for if he counts generally and the other pleads *nul wast fait*, the laymen perhaps will find no waste." In 1436 (Y. B. 14 H. VI. 23, 67), in trespass, the defendant urged these same reasons for entering his special plea: Juyn (J.), "I will not say that we cannot enter all this matter,[1] but if we should it would bring great *comberance* to the court. If we do it in this case we must in all others; and if we should enter such things we shall not have clerks enough in this place." Only the general issue was entered. In the Year Book 19 H. VI. 21, 42, a valuable little note, or small treatise, on "Color" is preserved, in which the need of entering special matter is pointed out in order to prevent the laymen from passing on questions of law. This sort of discussion is constantly going on.

We are not, then, to suppose because witnesses were not in general called to testify to a jury, that therefore the jury did not receive any evidence. The original simple conception of them as a body of witnesses, who "tried" the case by their answer was,

[1] For the court's discretion as to this, see Brooke, Ab., Gen. Issue, 15.

as we see, always qualified and always undergoing more qualification. Great pains, to be sure, was taken in early times to require publicity as regards matters which might be the basis of legal right, and to fix rights by making them dependent on easily known facts; the endowing at the church door, the requirement, in case of curtesy, of hearing the child cry within the four walls, the sale before witnesses, and all the law about hue and cry, are instances. It will be remembered, then, that a jury from any neighborhood was a body of persons far more likely to be informed than such a body would probably be to-day.[1] See, for instance, what was expected of a defendant in 1306 (Y. B. 34 Edw. I. 122), who turned up at court a day late, and offered the excuse that he was hindered by a flood. He was first questioned as to where and when. He couldn't have got here any way, says the demandant's attorney. The tenant: "I travelled night and day. Mallore, J.: What did you do when you came to the water and could not pass? Did you raise the hue and cry and *menée?*[2] For otherwise the country would have no knowledge of your hindrance. The tenant: No, sir, for I did not know so much law; but I cried out and halloed" (*Sire, nay, qe jeo ne savoye mie tant de ley, mes jeo criay e brayay*).

(*i*) The arrangements of the courts allowed of giving further information. As I have said, the explanatory, oral statements of the party or his counsel always contained the element of adding to what the jury already knew. As time went on this increased. We are to remember that the conception was that the jury in general knew the facts, and that they were able to judge of the truth of these conflicting statements.[3] In 1302 (Y. B. 30 Edw. I. 122–4), the jury gave their verdict; then Brumpton, J., says: "Tell us the damages. The assise: Ten shillings. Poleyn [counsel, breaking in]: There was a chest worth two marks, and other goods," etc. The judge warns the jury to be careful, for an attaint lies (since 1275) for damages, as well as the matter in chief. But the jury repeat their finding. We see this process well in a full and valuable case of 1465, a trial at

[1] Palg. Com. i. 247–8.

[2] And so Britton, f. 20, in speaking of the hue-and-cry: *oveke la menee des corns et de bouches.* Nichols translates: "with the company of horns and voices."

[3] *Isti* [the jury] *omnia sciunt que testes deponere norunt.* Fortescue, De Laud. c. 26 (about 1470).

bar,[1] in an assise of novel disseisin. This case shows us witnesses testifying openly to the jury; that practice had come in now. And it also shows us the counsel putting in evidence freely by mere allegations to the jury. Littleton, Fairfax, and others, serjeants, make a long narrative for the plaintiff. Yong does the same for the defendant. Sometimes a witness is called, and examined by the court. Sometimes he is only referred to as being present and ready to testify. Sometimes a document is put in. But mainly the statements of counsel are put forward as being in themselves evidence. It is interesting to notice that the judges suggested to the defendant's counsel discharging the inquest and demurring upon the evidence, then, probably, a pretty new thing in pleading; the plaintiff's counsel were ready for this, but the others declined; and the defendants afterwards lost by the jury's verdict. If they had demurred to the evidence they would have demurred to the allegations. A century later, in 1571,[2] in a famous demurrer upon evidence in an assise of novel disseisin, there is a long set of recitals of what William Bendloe, the plaintiff's serjeant, "said in evidence," and "gave in evidence," and "showed in evidence;" and then the defendants say that "the evidence and allegations aforesaid are insufficient in law," etc. And so, two centuries later, in Cocksedge *v.* Fanshawe.[3] In the great case of Gibson *v.* Hunter, in 1793,[4] in which the demurrer upon evidence, as a workable part of legal machinery in England, came to an end, after its life of about three centuries and a half, we find a note by the reporter seeking to reconcile this case with Cocksedge *v.* Fanshawe; the record in that case, it is said, "is agreeable to the ancient mode adopted in demurrers to evidence, in which it was usual to enter both the allegations of counsel in favor of the party offering the evidence and the evidence itself on the record, and to demur as well to the allegations as the evidence." This note is only wrong in its intimation that the allegations in former times were in any way a thing different from the "evidence." They appear to have been a leading and well recognized kind of evidence.

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[1] Babington *v.* Venor, Long Quint (5 Edw. IV.) 58.

[2] Newis *v.* Lark, Plow. 403, 407. This form, with others, is given in Rastell's Entries, 318–319 a.

[3] Doug. 119 (1779).

[4] 2 H. Bl. 187, 209–11.

(*j*) But not yet have I spoken of the method of informing the jury by witnesses testifying publicly in court. Always, as we see, there had been, in some cases, a mingling of the jury with witnesses in their private deliberations. Why did they not have more help of this sort? It is evident that sending out witnesses with the jury to testify to them, if they were such as either party should choose to call, might readily be abused; it would lend itself easily to irregular and corrupting influences. If such witnesses were to be used at all, one would guess that their communications would come in like those made by the respective parties or counsel in their addresses to the jury; they would have the character of statements confirmatory of these and supplementary, and like them would be publicly made in court. And that seems to have been the course of the development. I know of no reason to suppose that a party's casual witnesses[1] were originally sent out with the jury. There was legal process for the document-witness and others of the preconstituted class, but none for the other. How and when did this great change come about? No one as yet can tell with exactness. Let me mention a few things that may help in tracing the matter.

In 1354 we find among the Parliament Rolls a striking petition, of which an explanation may perhaps be found in a case of the year 1353 (Lib. Ass. 134, 12). Several persons, including one of the justices, had been accused of conspiracy in indicting J. as a felon, who was acquitted. H. answered that he was a justice at the sessions, and bound to inform the jury for the king to the best of his ability. Four others said that they were indictors. Another one said that when the indicting jurors made their oath (*quand les jurors sur l'enditement fir. serment*) he was sworn to inform them. This one was driven to plead not guilty; and all the others did the same. The king's counsel only wished a verdict as to two, and these (both of the last class) were found guilty. The justice seems to have pleaded *nolo contendere*, and the indictors were held excused. It may well have been this and like cases that led to a petition[2] to the king and council, in 1354, reciting the false and malicious charging of people with conspiracy and maintenance, and irregular

[1] To use Bentham's convenient phrase for the ordinary witness as distinguished from the "preappointed" one.

[2] Parl. Rolls, ii. 259, col. 2.

practices in procuring juries, both of accusation and trial, and praying for the correction of these evils, — "that hereafter when any people are at issue and the inquest is charged and sworn, all evidence which is to be said (*totes evidences que sont a dire*) be openly said at the bar, so that after the inquest departs with its charge, no justice or other person have conference (*parlance*) with them to move or procure the said inquest, but that they say the fact upon their own peril and oath." This petition was granted. It seems to promise a public offering at the bar of whatever evidence was to be given. But, observe, it does not inform us that, in fact, any other evidence was as yet given except such as we have heretofore considered.

But further consideration of this matter, and much else, must be crowded into a final article in the next number of the REVIEW.

James B. Thayer.

CAMBRIDGE.

[*To be concluded.*]